

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

Amendments to Chapter 12-46 Subchapter 9,  
Hawaii Administrative Rules  
January 24, 2012

SUMMARY

1. §12-46-181 is amended.
2. §12-46-182 is amended.
3. §12-46-183 is amended.
4. §12-46-187 is amended.
5. §12-46-193 is amended.

**§12-46-181 General provisions.** Chapter 378, HRS, prohibits any employer or other covered entity from discriminating in employment against individuals or persons because of a disability. Persons with a disability are entitled to equal employment opportunities as are available to persons without a disability. In 2009 the Legislature passed Act 30 and in 2010 the Legislature passed Act 139, which directed the commission to adopt administrative rules to conform, at minimum, to the definitions contained in the Americans with Disabilities Act Amendments Act (ADAAA), P.L. 110-325. Consistent with the ADAAA and its implementing regulations, the definition of disability is to be construed broadly in favor of expansive coverage to the maximum extent permitted by Chapter 378, HRS. The primary object of attention in cases brought under Chapter 378 and these administrative rules should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the person meets the definition of disability. The determination of whether a person has a disability should not demand extensive analysis. The examples are used to provide guidance to the public and only illustrate the particular point or principle to which they relate in the rules. They should not be taken out of context as statements of policy that would apply in different circumstances. To the greatest extent possible, the commission will interpret the rules consistent with the examples, however, the commission shall review each case on an individual basis in an effort to seek an equitable application of this subchapter. [Eff 8/18/94; am MAR 05 2012 ]  
(Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

**§12-46-182 Definitions.** As used in this subchapter, unless the context otherwise requires:

**"Being regarded as having such an impairment"** means is subjected to a prohibited action because of any actual or perceived physical or mental impairment that is not both transitory and minor, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. For purposes of this subchapter, "transitory" is defined as lasting or expected to last six months or less.

Example:

If an employer refuses to hire an applicant because of skin graft scars, the employer has regarded the applicant as a person with a disability.

Example:

If an employer terminates an employee because he has cancer, the employer has regarded the employee as a person with a disability.

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**"Disability"** means:

- (1) With respect to a person:
  - (A) Having a physical or mental impairment which substantially limits one or more major life activities;
  - (B) Having a record of such an impairment; or
  - (C) Being regarded as having such an impairment, as described in these rules.
- (2) Disability does not include transvestism, transsexualism, or gender identity disorders not resulting from physical impairments. Disability also does not include pedophilia, exhibitionism, voyeurism, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs.

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**"Major life activities"** means:

- (1) Basic activities that most people in the general population can perform with little or no difficulty, including, but not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, reading, sitting, standing, lifting, reaching, eating, sleeping, bending, concentrating, thinking, communicating, interacting with others, and working; and
- (2) The operation of a major bodily function, including, but not limited to, functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genito-urinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body.

**"Physical or mental impairment"** means:

- (1) In general:
  - (A) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, immune, circulatory, hemic and lymphatic, skin, and endocrine; or
  - (B) Any mental or psychological disorder, such as an intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

- (2) Physical or mental impairments include, but are not limited to, such conditions, diseases, and infections as: orthopedic, visual, speech, and hearing impairments; deafness; blindness; partially or completely missing limbs; mobility impairments requiring the use of a wheelchair; autism; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; AIDS; HIV infection or seropositivity; cancer; heart disease; diabetes; alcoholism; intellectual disability (formerly termed mental retardation; emotional illness; specific learning disabilities; developmental disabilities; bipolar disorder; post traumatic stress disorder; obsessive compulsive disorder; schizophrenia; and major depression.
- (3) Physical or mental impairments do not include physical, psychological, environmental, cultural, or economic characteristics, such as, but not limited to, eye or hair color; left-handedness; height, weight, or muscle tone that do not result from a physiological disorder; a characteristic predisposition to illness or disease; pregnancy; personality traits such as poor judgment or a quick temper when they are not symptoms of a mental or psychological disorder; poverty; a lack of education or illiteracy; a prison record; and sexual orientation. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a "record of" a substantially limiting impairment, or may be covered under the "regarded as" prong if it is the basis for a prohibited employment action and is not transitory and minor.

- (4) Drug use shall be considered a mental or physical impairment when a person:
  - (A) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in current illegal use of drugs;
  - (B) Has otherwise been rehabilitated successfully and is no longer engaging in current illegal use of drugs;
  - (C) Is participating in a supervised rehabilitation program, a recognized self-help program, or an employee assistance program, and is under the supervision of a licensed health care professional for the treatment of drug use and is no longer engaging in current illegal use of drugs; or
  - (D) Is erroneously regarded as engaging in such use, but is not engaging in such use.

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**"Qualified"** with respect to a person with a disability means a person with a disability who satisfies:

- (1) The requisite skill, experience, education, and other job-related qualification standards of the employment position such person holds or desires; and
- (2) Who, with or without reasonable accommodation, can perform the essential functions of such position.

**"Reasonable accommodation"** means:

- (1) In general:
  - (A) Modifications or adjustments to a job application process that enable an applicant with a disability to be considered for the position such applicant desires;
  - (B) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position

- held or desired is customarily performed, that enable a person with a disability to perform the essential functions of that position;
- (C) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy the same or equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities; or
- (D) Modifications or adjustments to schedules or leave policies to enable an employee with record of an impairment that previously substantially limited, but no longer substantially limits a major life activity, to attend follow-up or monitoring appointments from a health care provider.
- (2) Reasonable accommodation may include, but is not limited to:
  - (A) Making existing facilities used by employees readily accessible to and usable by persons with disabilities; and
  - (B) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for persons with disabilities.

**"Substantially limits":**

- (1) In general means limited in the ability to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or severely or

significantly restrict, a person from performing a major life activity in order to be considered substantially limiting.

- (2) The following factors may be considered in determining whether a person is substantially limited in a major life activity:
  - (A) The condition under which the person performs the major life activity;
  - (B) The duration of time it takes the person to perform the major life activity; and
  - (C) The manner in which the person performs the major life activity.
- (3) Certain impairments such as blindness, deafness, an intellectual disability (formerly termed mental retardation), partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, schizophrenia, HIV infection, and AIDS should easily be concluded to be substantially limiting.
- (4) The limitation resulting from an impairment is determined without regard to mitigating measures such as medicines; medical supplies, equipment or appliances; low vision devices; prosthetics including limbs and devices; hearing aid(s) and cochlear implant(s) or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations; auxiliary aids or services; learned behavioral or adaptive neurological modifications; or psychotherapy, behavioral therapy or physical therapy.



- (5) Non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.
- (6) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Examples of impairments that may be episodic or in remission include, but are not limited to, epilepsy, multiple sclerosis, cancer, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder and schizophrenia.
- (7) An impairment substantially limits the major life activity of "working" if it substantially limits a person's ability to perform either a class of jobs or a broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Example:

A baseball pitcher who develops a shoulder injury and can no longer pitch would not be substantially limited in working because of not being able to perform the single, particular job of pitching in baseball.

Example:

A person whose job requires heavy lifting develops a disability that prevents her from lifting more than fifty pounds and from performing not only her existing job but also other jobs that would similarly require heavy

lifting. That person would be substantially limited in working because she is substantially limited in performing the class of jobs that require heavy lifting.

- (8) Multiple impairments that combine to substantially limit one or more major life activities can constitute a disability.
- (9) In determining whether a person has a disability under the "actual disability" or "record of" prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve.

Example:

A person with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

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[Eff 8/18/94; am MAR 05 2012 ] (Auth: HRS  
§368-3) (Imp: HRS §§378-1, 378-2, 378-3)

**§12-46-183 Discrimination prohibited.** (a) It is unlawful for an employer or other covered entity to discriminate on the basis of disability against a qualified person in regard to:

- (1) Recruitment, advertising, and job application procedures;
- (2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- (3) Rates of pay or any other form of compensation and changes in compensation;
- (4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- (5) Leaves of absence, sick leave, or any other leave;
- (6) Fringe benefits available by virtue of employment, whether or not administered by the employer or other covered entity;
- (7) Selection and financial support for training, including apprenticeships, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training; and
- (8) Any other term, condition, or privilege of employment, including activities sponsored by an employer or other covered entity such as social and recreational programs.

(b) The term discrimination includes, but is not limited to, the acts made unlawful in sections 12-46-184 through 191, inclusive. [Eff 8/18/94; am MAR 05 2012 ] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

**§12-46-187 Failure to make reasonable accommodation.** (a) It is unlawful for an employer or other covered entity not to make reasonable accommodation to the known physical or mental limitations of an applicant or employee with a disability who is otherwise qualified, unless such employer or entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. An employee does not have to specifically request a "reasonable accommodation", but must only let the employer know that some adjustment or change is needed to do a job because of limitations caused by a disability.

(b) To determine the appropriate reasonable accommodation, it shall be necessary for an employer or other covered entity to initiate an interactive process, after a request for an accommodation, with the person with a disability in need of the accommodation. This process shall identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(c) It is unlawful for an employer or other covered entity to deny employment opportunities to an applicant or employee with a disability based on the need of such employer or entity to make reasonable accommodation to such person's physical or mental impairments.

(d) A person with a disability is not required to accept an accommodation, aid, service, opportunity, or benefit which such qualified person chooses not to accept. However, if such person, after notice by the employer or other covered entity of the possible consequences of rejecting, rejects a reasonable accommodation, aid, service, opportunity, or benefit that enables the person to perform the essential functions of the position held or desired and cannot, as a result of that rejection, perform the essential functions of the position, the person will not be considered qualified.

(e) An employer or other covered entity is not required to make a reasonable accommodation to a person who meets the definition of disability solely under the "regarded as" prong. [Eff 8/18/94; am MAR 05 2012 ] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2, 378-3)

**§12-46-193 Defenses.** An employer or other covered entity may raise defenses to an allegation of discrimination under this subchapter including, but not limited to, the following:

- (1) **Inability to perform.** It may be a defense to a charge of discrimination brought under this subchapter that a person with a disability is unable to perform an essential job function with or without a reasonable accommodation.
- (2) **Business necessity.** It may be a defense to a charge of discrimination brought under this subchapter that:
  - (A) An alleged application of qualification standards, tests, or criteria used in the selection of employees screens out or tends to screen out or otherwise denies a job or benefit to a person with a disability; or
  - (B) A uniformly applied standard, criterion, method of administration, or policy has a disparate impact on a person with a disability or a class of persons with disabilities; and the challenged standard, test, criterion, method, or policy has been shown by the employer or other covered entity to be job-related and consistent with business necessity in light of the factors in the definition of job-related and consistent with business necessity; and performance of essential job functions cannot be accomplished with reasonable accommodation, as required under this subchapter.

Example:

A job applicant for a field sales representative position, who was not hired, challenges a driver's license requirement as discriminating against persons who cannot

obtain licenses because of their disabilities. An employer may be able to defend by showing that driving was an essential job function, no other transportation alternative (i.e. bus or paratransit service) having less adverse effects upon persons with disabilities was available; and any accommodation would cause an undue hardship because field sales representatives had to work alone.

- (3) **Bona fide occupational qualification.** It may be a defense to a charge of discrimination that an application of qualification standards, tests, selection criteria, policies, or methods of administration which is applied to a class of persons on the basis of a specified physical or mental impairment, medical condition, or disability has been shown by the employer or other covered entity to be a bona fide occupational qualification.

Example:

An employer which does not consider for employment a person with hypertension because of a policy against hiring persons with hypertension due to safety concerns must establish that all or substantially all persons with hypertension, regardless of severity, would pose a direct threat to self or others; no reasonable accommodations are possible; and the essence of the business would be undermined if all persons with hypertension were not excluded.

- (4) **Undue hardship.** It may be a defense to a charge of not making reasonable accommodation that a requested or necessary accommodation would impose an undue hardship on the operation of the business.

Example:

An employer would not be required to make unreasonable structural changes or expensive equipment alterations if there is significant difficulty or expense based upon the factors listed in the definition of undue hardship.

- (5) **Direct threat.** It may be a defense to a charge of discrimination under this subchapter that a person with a disability posed a direct threat to the health or safety of the person or others that cannot be eliminated or reduced by reasonable accommodation.
- (6) **Specific permitted activity.** It may be a defense to a charge of discrimination that the alleged discriminatory action is specifically permitted under this subchapter or by section 378-3, HRS.
- (7) **Good faith.** If the employer or covered entity demonstrates good faith efforts, in consultation with the person with a disability who has requested an accommodation, to identify and make a reasonable accommodation that would not cause an undue hardship on the operation of the business, the employer or other covered entity may be liable for compensatory damages and other relief but would not be liable for punitive damages if the good faith offer of accommodation is found to be not reasonable.
- (8) **Claims based on transitory and minor impairments under the "regarded as" prong.** It may be a defense to a claim of discrimination by a person claiming coverage under the "regarded as" prong of the definition of disability that the impairment is or would be transitory and minor. A covered entity must demonstrate that the impairment is both "transitory" and "minor."



Whether the impairment is or would be transitory and minor is to be determined objectively. An employer or other covered entity may not defeat "regarded as" coverage of a person simply by demonstrating that it subjectively believed the impairment was transitory and minor. [Eff 8/18/94; am MAR 05 2012 ] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2, 378-3)

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

Amendments to chapters 12-46 subchapter 9, Hawaii Administrative Rules, on the summary page dated January 24, 2012, were adopted on January 23, 2012, following a public hearing held on November 22, 2011, after public notice was given in the Hawaii Tribune-Herald, West Hawaii Today, the Maui News, and the Garden Island News on October 16, 2011, and in the Honolulu Star-Advertiser on October 21, 2011.

These amendments shall take effect ten days after filing with the Office of the Lieutenant Governor.



DWIGHT TAKAMINE  
Director  
Department of Labor and  
Industrial Relations

APPROVED AS TO FORM:



Deputy Attorney General



NEIL ABERCROMBIE  
Governor  
State of Hawaii

Date: 2.22.12

Filed

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OFFICE OF THE LIEUTENANT GOVERNOR